90-1785

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TA-CHUN WANG a/k/a CHUN WONG
a/k/a CHUN T. WANG,

Petitioner,

vs.

CHUN WONG, LILY WONG and CITIBANK, N.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State Court violates the Supremacy Clause, Art. VI, clause 2, U.S. Const., and imposes an impermissible burden on the federal immigration program in clear conflict with specific Congressional purposes, by refusing to adjudicate the merits of fraud claims by an alien who has been granted amnesty and legalization of status under the Immigration Reform and Control Act of 1986, 8 USC §1255a, on the ground that the alien comes to court with "unclean hands" and forfeits his rights to judicial protection or recourse, because he concealed his illegal presence and immigration status in the United States, barring his claims that he is being exploited and fraudulently deprived of a 50% interest in real property by copurchasers who were aware of,

participated fully in, and benefitted directly from the acts of concealment, which caused no injury to any person.

2. Whether a State Court deprived an alien of property without due process of law in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution by invoking "unclean hands" to dismiss his fraud claims seeking to establish a 50% ownership in a two-family residence the alien purchased as a one-half partner with defendants because he concealed his illegal presence and immigration status in the United States from third parties where his copurchasers, defendants in his action, were aware of, participated fully in, benefitted directly from the joint conduct, obtained full ownership of the alien's interest as a result of the state court judgment and where no one was injured by the concealment.

3. Whether a State Court deprived an alien of property without due process of law in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution knowing that the state trial Court of general jurisdiction on the bench trial of a counterclaim brought by defendants to eject the alien found that the plaintiff alien's claim to one half ownership was supported by the facts and that plaintiff and defendants purchased the property as partners and "presently own one-half each" yet ejected the alien from the premises after the Appellate Division ruled the plaintiff alien had "unclean hands" and had forfeited his rights to judicial protection or recourse, and the highest court of the State declined review.

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OPINIONS IN THIS CASE

The decision and order of the Appellate Division of the Supreme Court of New York, Second Judicial Department, sought to be reviewed, affirming the grant of summary judgment dismissing petitioner's claims, is reported, ___ A.D.2d ___, 557 N.Y.S.2d 434, July 2, 1990, and is reproduced in the appendix to this Petition, A1.

The memorandum decision of the Supreme Court, Kings Co., Shaw J., dated November 10, 1988, granting summary judgment dismissing petitioner's claims, is unreported, and is reproduced in the appendix to this Petition, A5.

The memorandum decision of the Supreme Court, Kings Co., Monteleone, J., dated November 2, 1989, rendered following a bench trial, accepting

petitioner's version of the facts as substantially supported by the evidence, is unreported, and is reproduced in the appendix to this petition, A17.

JURISDICTIONAL GROUNDS IN THIS COURT

The decision and order of the Appellate Division, Second Department, sought to be reviewed, A1, was entered on July 2, 1990. This order of the Appellate Division finally determined plaintiff's action in that it affirmed the dismissal of all of plaintiff's causes of action in the complaint, defendants' counterclaims having been expressly severed for trial by a judgment entered on December 2, 1988. Sirlin Plumbing Co. v. Maple Hill Homes, Inc., 20 N.Y.2d 401, 283 N.Y.S.2d 489 (1967); see also, Crystal v. Manes, 130 A.D.2d 979, 516 N.Y.S.2d 823 (4th Dept. 1987). A timely motion by petitioner for

reargument and leave to appeal was denied by the Appellate Division by order dated October 12, 1990, A26. A timely motion by petitioner for leave to appeal to the New York Court of Appeals was denied by that Court by order entered on February 19, 1991, A27. 28 USC §1257(a) is the statutory provision which confers on this Court jurisdiction to review this case by writ of certiorari. This petition will be timely filed pursuant to Rule 13.1 of the Rules of this Court, on or before May 20, 1991, within 90 days after the entry on February 19, 1991, of the order of the New York Court of Appeals denying discretionary review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. VI, cl. 2, U.S. Const.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be

made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 245A, added to the Immigration & Naturalization Act by the Immigration Reform and Control Act of 1986, 8 U.S.C. §1255a, is set forth verbatim in pertinent part in the appendix to this petition, A28.

STATEMENT OF THE CASE

Petitioner came to the United States from Taiwan as a journalist for the China Daily News in 1964. Articles critical of the ruling Chinese Nationalist Government brought him into disfavor with the Government. Petitioner applied for political asylum in the United States which was denied. A17. Thereafter, petitioner remained in the United States as an illegal alien. In 1976, petitioner, as an illegal alien, jointly purchased as a one-half partner with respondent Lily Wong a two-family residence in Brooklyn, New York.

Because he was in the United States illegally, petitioner concealed his status and identity in various ways in relation to his purchase and ownership of his home.

At work, petitioner used the name

and social security number of respondent Chun Wong as his own. Petitioner reported his income on the Wongs' tax returns. The property purchased in 1976 was conveyed to "Chun Wong, & Lily Wong, his wife." Petitioner appeared as Chun Wong with respondent Lily Wong at the signing of the purchase contract for the premises, in applying for the mortgage to purchase the premises and in executing a subsequent note and mortgage. He appeared as Chun Wong with respondent Lily Wong at the closing of the purchase.

At the time of their joint purchase petitioner and the respondent Wongs had been sharing an apartment in Manhattan. Following the purchase they moved to Brooklyn and lived in the premises they jointly owned.

For over a decade, as they lived together sharing expenses petitioner had no reason to suspect that his 50%

ownership interest in the premises would be denied or repudiated by respondents Wong. The record contains admissions by respondent Lily Wong of petitioner's one-half ownership. A19-20. With the enactment of the Immigration and Control Act of 1986, 8 U.S.C. §1255a, petitioner became eligible for amnesty and legalization of status, and made known to respondents Wong his intention to legalize his status. Legalization would permit petitioner to emerge from the shadowy world of an undocumented alien and would remove the leverage and advantage respondents Wong enjoyed over him. In 1987, the Wongs without petitioner's knowledge acted to appropriate to themselves petitioner's one-half interest. They secretly refinanced the mortgage with a different bank at a higher rate of interest, prepaid the original mortgage and kept

for themselves the remaining cash proceeds of the refinancing. Thereafter in 1987 petitioner discovered this fraudulent conduct. Anticipating that the respondents Wong would not only deny his 50% ownership but would seek to evict him, plaintiff commenced an action in September 1987 in the Supreme Court of the State of New York, Kings County, seeking to establish his 50% ownership and his share of proceeds from the refinancing. The respondents Wong counterclaimed seeking to eject petitioner from the premises and recover a monetary award for use and occupancy.

The trial court granted a motion for summary judgment by defendants Wong and dismissed all of petitioner's causes of action. It held that petitioner's claims for fraud and for an equitable lien were barred by unclean hands and fraud on his part. See A12-13.

The Appellate Division affirmed. It stated, A2:

> At the time of the conveyance, the plaintiff was an illegal alien in this country, and was using the defendant Chun Wong's social security number. The plaintiff admits that any income that he earned was reflected on the Wongs' tax returns as income earned by the defendant Chun Wong. Indeed, the plaintiff also admits that he did not use his real name until 1986, when he applied for and received amnesty with respect to his status as an illegal alien.
>
> It is undisputed that the plaintiff, prior to the closing of title, posed as the defendant Chun Wong in executing a contract for the purchase of the subject premises. The plaintiff also acknowledges that he posed as Chun Wong when he and the defendant Lily Wong signed a mortgage application with the Bowery Saving Bank in order to purchase the premises. Further, the plaintiff admits that he executed a subsequent note and mortgage, while again posing as Chun Wong, and that he attended the closing with Lily Wong, still representing himself to be Chun Wong.

The Appellate Division ruled that these acts constituted unclean hands and forfeited petitioner's right to judicial

protection or recourse against the fraud of respondents Wong, A3-4:

> The defendants argue that the Statute of Limitations also defeats the plaintiff's cause of action for the imposition of an equitable lien, and the cause of action to recover damages for fraud. Even if we accept the plaintiff's contention, arguendo, that the Statute of Limitations did not begin to run until the Wongs refinanced in 1987, we conclude that the plaintiff's unclean hands in participating in a course of deception and deceit is an effective bar to all of the causes of action in the complaint, including the cause of action for interposition of an equitable lien (see, Farino v. Farino, 88 AD2d 902; see also, 30 CJS Equity, §95[b]; 55 NY Jur 2d, Equity, §119), and the cause of action sounding in fraud. Having engaged in a fraudulent scheme involving the conveyance of the premises, the plaintiff has forfeited his right, in law or equity, to protection or recourse in a dispute involving his accomplices in that very scheme (see, Sayres v. Decker Automobile Co., 239 NY 73; 60 NY Jur2d, Fraud and Deceit, §175).

The trial court entered judgment on December 2, 1988, dismissing petitioner's causes of action and severing for trial the counterclaims of respondents Wong.

While petitioner's appeal was pending, respondents Wong moved for and were granted a preference for the trial of the counterclaims. The Court suggested that in order to avoid a trial de novo the matter be adjourned until the resolution of plaintiff's pending appeal to the Appellate Division, but respondents Wong objected and insisted that the trial go forward, A23.

A bench trial was held, and in a memorandum decision dated November 2, 1989, A17, the Court found petitioner's version of the facts was supported by substantial evidence, that respondent Lily Wong's version was not credible and that petitioner and Lily Wong intended to buy the property as partners and that they presently own one-half each, A23.

These factual findings were made in November 1989 during the pendency of petitioner's appeal to the Appellate

Division from the November 1988 dismissal of his claims. Petitioner lost the benefit of these factual findings after the Appellate Division in its July 2, 1990, order affirmed the denial of his rights on grounds he came to Court with unclean hands. Following the affirmance the trial court entered judgment providing for petitioner's ejectment. Petitioner appealed from the judgment and obtained a statutory stay of ejectment pending appeal by posting a bond. Petitioner asked the Appellate Division for an enlargement of time to perfect this appeal pending a decision by the New York Court of Appeals on his motion for leave to appeal from the Appellate Division's July 2 order. The Appellate Division without opinion denied the motion, dismissed the appeal, refused a further stay of ejectment, and denied a motion to reargue the dismissal.

In April 1991 with the Sheriff poised to execute upon the judgment of ejectment petitioner was forced to vacate the premises.

Following affirmance by the Appellate Division of its July 2, 1990, decision and order, petitioner moved for reargument and in the alternative for leave to appeal. By order dated October 12, 1990, the Appellate Division denied reargument and leave to appeal without opinion, A26.

Petitioner then moved in the Court of Appeals for leave to appeal to that Court. The Court of Appeals denied this motion by order entered on February 19, 1991. A27.

This petition follows.

REASONS FOR GRANTING THE WRIT

The refusal of the Appellate Division to adjudicate petitioner's claims that he is being exploited and defrauded by defendants Wong because he comes into court with "unclean hands" based on his past concealment of his illegal immigration status is in clear conflict with specific Congressional and Presidential purposes embodied in the amnesty and legalization provisions of the Immigration Reform and Control Act of 1986, 8 USC §1255a, ("IRCA"). The decision imposes an impermissible burden on the federal immigration program in violation of the Supremacy Clause, Art.VI., cl. 2, U.S. Const.

The IRCA made eligible for amnesty, legalization of immigration status and eventual citizenship, aliens like plaintiff who had long resided illegally

in the United States. Entitlement to adjustment of status for aliens who met the statutory criteria was granted as a matter of right and not administrative discretion. See 2 Gordon and Mailman, Immigration Law and Procedure, §52.01 et seq. (Rev.Ed. 1990). See also 2 Gordon and Gordon, Immigration Law and Procedure, Practice and Strategy, §22.07 (Rev.Ed. 1990).

Petitioner Wang was a member of a vast underclass of illegal immigrants numbering in the millions. Faced always with the threat of exposure, deportation and often as is true with Mr. Wang the fear of political persecution if returned to one's native land illegal immigrants have been exploited, abused, coerced and robbed in a great variety of ways. Property losses to parties preying on their vulnerability, such as petitioner Wang's loss of his home, are common

occurrences creating injustice, injury and violence. It is a specific purpose of the IRCA to safeguard against exactly the kind of exploitation that has occurred in this case.

Petitioner resided in the United States as an illegal alien for many years. His illegal status was completely known to respondents Wong. Passage of the IRCA and petitioner's eligibility for amnesty and legalization under the Act, which meant that he would be able to live openly and hold property in his own name, precipitated the fraud upon him by respondents Wong, in 1987, when they refinanced the original mortgage with a different bank without petitioner's knowledge, prepaid the original mortgage and pocketed for themselves the remaining cash proceeds of the refinancing.

The President upon signing the IRCA stated:

> "The legalization provisions in this act will go far to improve the lives of a class of individuals who now must hide in the shadows without access to many of the benefits of a free and open society. Very soon many of these men and women will be able to step into the sunlight and, ultimately, if they choose, they may become Americans."

U.S. Code Cong. and Admin. News, 1986, Vol. 6, p.5856-1.

The legislative history of the Act recognizes the fear that pervaded the lives of illegal aliens and the need to protect them from exploitation:

> "The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United Sstates in myriad ways, including providing their talents, labor, and tax dollars. However, because of their undocumented status, these people live in fear, afraid to seek help

> when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill."

H.R. Report No. 682, 99th Cong., 2d Sess., pt. 1, at 49 (1986); 6 U.S. Code Cong. and Admin. News, 99th Cong. 2d Session, p. 5649 at 5653 (1986).

The Internal Revenue Service, recognizing that it is a common practice for illegal aliens to fail to file tax returns or to file tax returns or report income under false names and false social security numbers has published advice for legalized aliens as to the steps that can be taken to make corrections. IRS advises legalized aliens to file returns for prior years or to notify IRS if returns for previous years have been filed "using an improper name or social security number... so that the taxes can be properly credited to your account." Aliens that "used

different names and numbers during different years" are instructed to "list separately each year and the names and numbers used." In order to get proper credit for taxes withheld under false names or social security numbers, the IRS advises aliens to go back to their employer and ask for a specified form to make corrections for past years. IRS Publication 927, Tax Obligations of Legalized Aliens (August 1987).

The foregoing specific purposes and policies of IRCA, its legislative history and administrative implementation were brought to the attention of the Appellate Division on petitioner's direct appeal and his motion to reargue the Court's July 2, 1990 order and were included in petitioner's motion to the Court of Appeals for leave to appeal. The opinion of the Appellate Division shows an express awareness that petitioner

concealed his identity because he was an illegal alien and that he did not use his real name until 1986, when he applied for and received amnesty with respect to his status as an illegal alien, A2. In characterizing petitioner's actions as "a course of conduct of deception and deceit" that bars petitioner's claims, A3, the Appellate Division simply ignored the ameliorative purposes of IRCA, and emasculated the benefit of amnesty and legalization to which petitioner was entitled and was granted under IRCA.

The decision of the Appellate Division merits review by this Court for at least two fundamental reasons. First, the decision undercuts the effectiveness of the IRCA vitiating benefits it was the purpose of IRCA to convey. Second the decision is a significant inroad on the supremacy of federal law which should be identified and publicly corrected

because it has the potential to be widely replicated. The harm done to the federal immigration program by this judicial decision is invidious, because the decision does not turn as so many cases do, on rules that single out aliens for unfavorable treatment of some kind. Here, the Appellate Division, applied an ostensibly facially neutral rule of equity in blatant disregard of explicit federal immigration policies and purposes, a rule of doubtful soundness when subjected to close analysis, see Zechariah Chafee, Jr., Some Problems of Equity, 1-102 (University of Mich.L. School 1950)(the clean hands doctrine ought not be called a maxim of equity; it is really a bundle of rules; insofar as it is a principle it is not very helpful but is at times capable of causing considerable harm, at p.2). It did so in disregard of the fact that when applied

to the underclass of illegal aliens that it is the purpose of IRCA to protect, the view that legalized aliens come into court with unclean hands operates to deprive members of the class, like petitioner, of constitutional protection as well as the essential benefits of coming out of the shadows into the sunlight, see the Presidential quote at p. 17 above, that the statute was intended to confer.

There is enormous potential for mischief and violence to the purposes of statutes such as IRCA if facially neutral state action by state courts and administrative agencies is taken to the disadvantage of legalized aliens and other classes of persons entitled to protection and benefits under federal law. Review by this Court is essential to provide a much needed corrective, calling attention to the pervasive

remaining problem and thus minimizing its recurrence.

The burden imposed on the federal immigration program by the decision of the Appellate Division and the clear conflict between the decision and specific Congressional and Presidential purposes is much greater in the present case than in prior cases where this Court has granted certiorari and then judged invalid state interference with the federal immigration program, see e.g., Toll v. Moreno, 458 U.S. 1 (1982)(invalidating on supremacy grounds a state university's policy of denying in-state status to domiciled nonimmigrant aliens with G-4 visas); cf. De Canas v. Bica, 424 U.S. 351 (1976), upholding a state statute as not unconstitutional in some respects but remanding the case to the state courts for further proceedings to clarify the state statute's meaning

and effect and to decide in the first instance whether it conflicts with federal immigration law; see also, Dingemans v. Board of Bar Examiners, 152 Vt. 494, 568 A.2d 354 (1989), invalidating as violative of the Supremacy Clause, and as an impermissible burden on the federal immigration program Congress could not have intended, a Vermont Supreme Court rule that restricted admission to the Vermont bar to citizens or lawfully admitted permanent resident aliens and denied admission to an alien holding a nonimmigrant H-1 visa that permitted her to work for three years as a legal consultant for a law firm in Vermont.

In upholding "unclean hands" as a defense barring petitioner's fraud claims in disregard of the specific policies and purposes of the amnesty and legalization program for illegal aliens,

8 U.S.C. §1255a, the Appellate Division failed to fulfill its responsibility under the Supremacy Clause to apply federal law. This state law defense should not have been available. Cf. Howlett v. Rose, 496 U.S. ___, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) (state-law sovereign immunity defense held not available to school board in state court action under 42 U.S.C. §1983).

Petitioner has suffered a deprivation of his property without due process of law that is personal, stark and tragic, and at the same time threatens with similar harm the underclass to which he belongs, aliens recently granted amnesty. The fraud claims and the opportunity to be heard upon them, of which petitioner has been deprived, are species of property protected by the 14th Amendment, Logan v. Zimmerman Brush Co., 455 U.S. 422,

429-31 (1982).

Petitioner has been arbitrarily deprived of this property on grounds that will not bear scrutiny. His concealment of his identity and illegal status caused no harm to any third person. The respondents Wong knew about and participated in the acts of concealment and benefited directly from them. There is no rational basis for invoking "unclean hands" or forfeiture of petitioner's rights to judicial protection or recourse in an action between petitioner and the Wongs. A court's equity powers may not be exercised in such a manner as to deprive a person of constitutionally or statutorily protected rights. Seguros Banvenez, S.A. v. S/S Oliver Drescher, 761 F.2d 855, 863 (2d Cir. 1985).

Petitioner has not only been arbitrarily deprived of his claims and

the opportunity to have them heard, he has also been deprived of the benefit of the factual findings in his favor that were made by the Supreme Court, Kings County, in the bench trial of the severed counterclaims of respondents Wong to eject petitioner from the premises. The Court found petitioner's version of the facts was supported by substantial evidence, that respondent Lily Wong's version was not credible, that petitioner and Lily Wong intended to buy the property as partners and that they presently own one-half each, A23.

In April 1991 with the Sheriff poised to execute the judgment of ejectment against him petitioner had no choice but to vacate the premises. Although in so doing he suffered a degree of irreparable harm, his fraud claims are not moot and merit review by this Court.

Initially, petitioner, as would be

true for most aliens granted amnesty under IRCA and seeking relief from exploitation and fraud, could not have sued in federal court. At the time he commenced his action against respondents Wong petitioner had no federal claims and no access to a federal district court. In the state court proceedings that ensued important federal rights of petitioner and the underclass to which he belongs have been violated. But notwithstanding these existing violations of federal rights leading to his loss of property and ejectment pursuant to a state court judgment which would otherwise be actionable under 42 U.S.C. §1983, see e.g., Pennziol Co., v. Texaco, Inc., 481 U.S. 1 (1987), petitioner cannot now go into federal district court to assert the claims because such an action would be in the nature of an appeal, over which the

District Court would lack jurisdiction. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); cf. Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) vacated and remanded, 477 U.S. 902 (1986); Rhoades v. Penfield, 694 F.2d 1043, 1046-1047 (5th Cir. 1983); but cf. Alcan Aluminum Corp. v. Lyntel Products, 656 F.Supp. 1138 1141-43 (1987).

The only opportunity to remedy the deprivation of petitioner's federal rights, to safeguard those of similarly situated legalized aliens, and to overturn the judicial rulings in this case that do fundamental violence to the federal immigration program and the supremacy of federal law is review by this Court. The important federal issues raised by this case merit review.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, NY

May 17, 1991

Respectfully submitted,

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APPENDIX

Decision and Order, Appellate Division
Second Department, Dated July 2, 1990

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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Z/hu
____AD2d____ Argued - May 31, 1990

LAWRENCE J. BRACKEN, J.P.
THOMAS R. SULLIVAN
STANLEY HARWOOD
ALBERT M. ROSENBLATT, JJ.

3946E

DECISION & ORDER

Ta Chun Wang a/k/a Chun Wong a/k/a Chun T. Wang, appellant, v Chun Wong, et al., respondents.

Douglas B. Payne, New York, N.Y. (Raggio Jaffe & Kayser [Declan P. Redfere] of counsel), for appellant.

Robert V. Ferrari, New York, N.Y. (Tina H. Isselbacher of counsel), for the respondents Wong.

In an action, *inter alia*, for the reformation of a deed, the imposition of a constructive trust and an equitable lien, and to recover damages for fraud, the plaintiff appeals from so much of an order and judgment (one paper) of the Supreme Court, Kings County (Shaw, J.), entered December 2, 1988, as, upon granting the motion of the defendants Chun Wong and Lily Wong for summary judgment dismissing the complaint insofar as it is asserted against them and upon searching the record and granting summary judgment to the defendant Citibank N.A. dismissing the complaint insofar as it is asserted against it, is in favor of the defendant and against him.

Decision and Order, Appellate Division
Second Department, Dated July 2, 1990

ORDERED that the order and judgment is affirmed insofar as appealed from, with costs to the respondents Chun Wong and Lily Wong.

The plaintiff commenced this action by which he claims rights of ownership in a two-family house in Brooklyn which a third person conveyed in 1976 to "Chun Wong & Lily Wong, his wife", who are the defendants in this action.

At the time of the conveyance, the plaintiff was an illegal alien in this country, and was using the defendant Chun Wong's social security number. The plaintiff admits that any income that he earned was reflected on the Wongs' tax returns as income earned by the defendant Chun Wong. Indeed, the plaintiff also admits that he did not use his real name until 1986, when he applied for and received amnesty with respect to his status as an illegal alien.

It is undisputed that the plaintiff, prior to the closing of title, posed as the defendant Chun Wong in executing a contract for the purchase of the subject premises. The plaintiff also acknowledges that he posed as Chun Wong when he and the defendant Lily Wong signed a mortgage application with the Bowery Savings Bank in order to purchase the premises. Further, the plaintiff admits that he executed a subsequent note and mortgage, while again posing as Chun Wong, and that he attended the closing with Lily Wong, still representing himself to be Chun Wong.

On or about September 9, 1987, the plaintiff brought this action to reform the deed to reflect his purported ownership in the premises, and for other equitable and legal forms of relief. The Supreme Court granted summary judgment to the defendants dismissing the complaint. We affirm.

The plaintiff contends that the deed should be reformed to reflect the actual agreement of the parties at the time the premises were conveyed. He claims that he was to receive ownership rights in the premises, and that the name "Chun Wong,"

on the deed, was a "scrivener's mistake". We hold that this cause of action must fail, because the Statute of Limitations started running at the time the "scrivener's error" was made (*see*, CPLR 213[1]; *Hart v Blabey*, 287 NY 257; *Acres v Hitchcock*, 77 AD2d 744). Because the plaintiff was in possession of the deed from the time of its execution, we find no merit in his assertion that he did not have notice of a claim "adverse" to his claim until 1987, when the Wongs obtained refinancing from the defendant Citibank N.A. (*cf.*, *Hart v Blabey*, *supra*; *Tursi v St. Joseph's Sanatorium*, 133 AD2d 910). In any event, the plaintiff's assertion that there was a "scrivener's mistake" is belied by his admission that he intended to pose as Lily Wong's husband. Since the deed reflects the actual agreement of the parties, an action for reformation will not lie (*see*, *Lewitt & Co., Inc. v Jewelers' Safety F. Society*, 249 NY 217; *see also*, 16 NY Jur 2d, Cancellation and Reformation of Instruments, § 36).

We also conclude that the plaintiff's cause of action for the imposition of a constructive trust is similarly time barred. The Statute of Limitations for interposition of a constructive trust commenced "upon the occurrence of the wrongful act giving rise to a duty of restitution" (*Mattera v Mattera*, 125 AD2d 555, 556-557). Under the circumstances of this case, that duty arose at the time the deed to the property was executed, in 1976. Therefore, this cause of action was properly dismissed as time barred (*see*, CPLR 213[1]; *Mattera v Mattera*, *supra*; *Kitchner v Kitchner*, 100 AD2d 954; *see also*, *Scheuer v Scheuer*, 308 NY 447).

The defendants argue that the Statute of Limitations also defeats the plaintiff's cause of action for the imposition of an equitable lien, and the cause of action to recover damages for fraud. Even if we accept the plaintiff's contention, arguendo, that the Statute of Limitations did not begin to run until the Wongs refinanced in 1987, we conclude that the plaintiff's unclean hands in participating in a course of conduct of deception and deceit is an effective bar to all of the causes of action in the complaint, including the cause of action for interposition of an equitable lien (*see*, *Farino v Farino*, 88 AD2d 902;

see also, 30 CJS Equity, § 95[b]; 55 NY Jur 2d, Equity, § 119), and the cause of action sounding in fraud. Having engaged in a fraudulent scheme involving the conveyance of the premises, the plaintiff has forfeited his right, in law or equity, to protection or recourse in a dispute involving his accomplices in that very scheme (*see*, *Sayres v Decker Automobile Co.*, 239 NY 73; 60 NY Jur 2d, Fraud and Deceit, § 175).

Finally, since the plaintiff has no legal interest in the premises, his cause of action seeking to "cancel" the mortgage with the defendant Citibank, N.A. was also properly dismissed (*see*, Siegel, NY Prac § 136).

BRACKEN, J.P., SULLIVAN, HARWOOD and ROSENBLATT, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

Memorandum Decision, Supreme Court, Kings County, Shaw J., Index No. 24559/87, Dated November 10, 1988

SUPREME COURT: KINGS COUNTY (IAS, PART 12)

TA-CHUN WANG a/k/a CHUN WONG a/k/a CHUN T. WANG,

vs.

CHUN WONG, LILY WONG and CITIBANK, N.A.,

By SHAW, J.

Dated November 10, 1988

Index No. 24559/87

In this action to, *inter alia*, impose a constructive trust, defendants Lily Wong and Chun Wong move for summary judgment dismissing the complaint and for summary judgment on their counterclaim for ejectment. Defendants also request severance of their remaining counterclaims. In opposition, plaintiff opposes the motion and cross-moves for an accounting of the mortgage proceeds received by Lily and Chun Wong from the defendant Citibank, N.A. (Citibank), and for an order enjoining Lily and Chun Wong from dissipating or disposing of said mortgage proceeds. Citibank also cross-moves to dismiss the complaint. The pertinent facts are as follows:

According to the testimony of plaintiff given at a prior proceeding,[1] he suggested to the defendants Wong, who are husband and wife, that they buy a house for an investment as well as for living quarters. Plaintiff had been living at 185 Hester Street, in New York City with the Wongs and their family as a result of losing his old apartment.

On or about July or August of 1975, the plaintiff and the Wongs went to view a two-family dwelling known as 730 Avenue T, Brooklyn, New York. Defendant Chun Wong testified at the prior proceeding that after seeing the house for a second time, he and his wife decided to purchase it. Both Lily and Chun

Wong testified that although they did not have enough money, they were determined to buy the house and that plaintiff agreed to "chip in" with them to enable them to buy the house. Defendants further testified that plaintiff's action was conditioned on defendants allowing him to live in the house rent-free for ten years. At the end of the ten years, plaintiff said he would return to Taiwan.

Thereafter, plaintiff and Lily Wong filled out a mortgage application with Bowery Savings Bank (Bowery). Lily Wong had previously given the seller a down payment of $5,900.00 at the time the contract was signed and plaintiff testified he signed the contract as "Chun Wong." The names of the defendants Lily and Chun Wong were also put on the mortgage application with plaintiff representing his income as that of the defendant Chun Wong. Admittedly, plaintiff was known as Chun Wong at his job and had used defendant Chun Wong's social security number in connection with his employment as he was in this country illegally. Plaintiff testified that prior to obtaining amnesty in 1987, he was known in American as Ta-Chun Wang or Chun T. Wah. Nevertheless, since plaintiff's income was reflected as that of the defendant Chun Wong on plaintiff's W-2 forms, plaintiff never filed his own income tax return but filed income tax returns during that twenty-year period for Chun and Lily Wong only. In any event, plaintiff claims he filled out the mortgage application in that manner in order to obtain the mortgage, as his salary was equal to the combined income of defendants. That application was subsequently granted and Bowery Savings Bank gave them a mortgage commitment in the amount of $40,000. Plaintiff stated in his testimony that he and the defendants agreed to split all the expenses of operating the house although defendant Chun Wong testified no such partnership agreement was ever made.

It is undisputed that both Lily Wong and plaintiff attended the closing of the house and that the defendant Chun Wong did not attend, although he was physically able. Defendant Chun

Wong testified that plaintiff attended the closing in his stead because his wife told him that plaintiff knew English better and that plaintiff could substitute as signer of the papers. He also stated that he told plaintiff to attend the closing with Lily to help her read all the papers and that he authorized plaintiff to sign on his behalf. Lily Wong testified that plaintiff requested to attend the closing in her husband's place because he knew how to read and could understand English and that he would sign her husband's name to the papers.

The closing was held on January 8, 1976. Lily Wong testified that at said closing, she contributed an additional $4,500.00 toward the purchase of the house and that plaintiff contributed approximately $8,000. She further stated that she never represented to anyone, including her attorney, that the plaintiff was her husband and although plaintiff signed a mortgage note as well as the deed to the property, he was signing in her husband's name. In contrast, plaintiff testified that while Lily Wong paid $4,500 at the closing, he contributed more than $10,000. In fact, he thought his money was being used to purchase the house and not as a loan. He also stated that Lily Wong represented him to be her husband and that he signed the deed as "Chun Wong" and that he took possession of the deed after the closing. The deed lists the owners of the house as "Chun Wong and Lily Wong, his wife". Plaintiff claims that during the confusion at the closing, he did not scrutinize the deed and did not realize Lily Wong had been described in the deed as his wife.

Subsequently, the parties moved into the second floor apartment of the house, with plaintiff occupying a bedroom on that floor. The first floor apartment was leased to a third party. Plaintiff testified that defendant Chun Wong stayed at the premises about once a week on his day off and Chun Wong admits spending most of his time at the apartment at 185 Hester Street, which he never relinquished. Plaintiff also stated that Lily Wong collected the rent from the tenants and a former tenant testified

that rent was paid to Lily Wong, whom she believed to be the landlord. Plaintiff also testified that he and Lily Wong contributed towards payments for repairs and maintenance and that Lily Wong made the mortgage payments on the house. In fact, plaintiff previously stated at his examination before trial that Lily Wong paid the mortgage and that the checks were drawn on an account maintained by Lily Wong and that deposits were made into the account from rental income and from her salary. In any event, Lily Wong testified that she paid the electric bills and plaintiff paid about $1,500 per year toward the heating bill in exchange for defendants paying for food, as plaintiff always dined with them. Plaintiff claims that through early 1987, defendants repeatedly orally confirmed to him that he was one-half owner of the subject premises.

With respect to the first floor apartment in the subject premises, the last tenant of that apartment testified that she and her family moved out in August, 1986, as a result of receiving a letter requesting they move out within three months due to the landlords' need for the apartment. The letter was dated July 8, 1986, and was ostensibly signed by Chun and Lily Wong. However, defendants claim they never signed the notice nor did they have any knowledge of it. In fact, the tenant testified that she spoke with Lily Wong subsequent to her moving and told her about the letter requesting that she move. The tenant further testified that in response, Lily Wong stated that she never gave her such a letter and was surprised she moved out.

Plaintiff testified that subsequently, in March of 1987, he received a letter from an insurance company listing the defendant Citibank, and not the Bowery Savings Bank, as holder of the mortgage. Upon inquiry, he stated that he was told by the Bowery Savings Bank that his "wife paid off all the mortgage." In fact, defendants refinanced the existing mortgage through Citibank in the approximate amount of $120,000. Lily Wong testified that she used about $20,000 of the proceeds to fix up the house, including the first floor apartment. She further testified that on June 11, 1987, plaintiff moved out of the second

floor apartment and into the first floor apartment without permission from either of the Wongs, and changed the locks on the door leading from the hallway to the first floor. She claimed that she requested plaintiff to leave because she was in the process of advertising to rent that apartment. On the other hand, plaintiff testified that he moved because he did not want to be upstairs with the Wongs any more and claimed he needed no permission to move downstairs as it was his house. He also stated that Lily Wong told him to move downstairs if he thought it was his apartment. Finally, Lilly Wong testified that on two separate occasions, April and July of 1987, plaintiff told her he was returning to Taiwan by the end of July to take a lucrative position with a Chinese TV station.

Plaintiff asserts five causes of action in support of his claim that he is 50% owner of the house with defendants. The first cause of action seeks reformation of the deed with plaintiff claiming that the description of Lily Wong as his wife was a scrivener's error. The second cause of action seeks to impose a constructive trust of a 50% interest on the subject premises. The third cause of action is for fraud in which plaintiff claims the Wongs knowingly misrepresented that they were holding a one-half interest in the subject premises in his behalf. Although asserted as a claim for unjust enrichment, plaintiff's fourth cause of action is actually an assertion of an equitable lien on the premises resulting from money plaintiff expended in connection with the property based on the understanding he would receive a one-half interest. The fifth and final cause of action is asserted against Citibank in which plaintiff seeks to set aside and cancel their mortgage as plaintiff never executed or authorized the instrument creating a mortgage interest in the premises to Citibank.

On their motion for summary judgment dismissing the complaint, defendants claim that the first four causes are, *inter alia*, barred by the statute of limitations as well as the "clean hands doctrine". With respect to the fifth cause of action, the

defendants claim that plaintiff has no standing to set aside the mortgage if it is determined he has no interest in the property.

In opposition, plaintiff claims that the statute of limitations does not bar the claim for reformation as the error was the direct result of Lily Wong's fraud in describing plaintiff as her husband. In addition, as a result of the Wongs' repeated fraudulent assurances from 1975 through 1987 that plaintiff was 50% owner of the premises, he did not scrutinize the deed and the defendants are equitably estopped from raising the statute of limitations. With respect to the claim for a constructive trust, plaintiff contends that the six-year statute of limitations does not bar this claim as the statute runs from the time the trust agreement was repudiated which in this instance did not occur until 1987. In addition, plaintiff claims the action for fraud is also timely as the fraud committed by defendants was ongoing up to and including June 1987. Finally, plaintiff claims that both the fourth and fifth causes of action state a claim for which relief may be granted. With respect to his cross-motion, plaintiff claims that defendants obtaining the mortgage from Citibank was the result of fraud in the application process.

With regard to defendants' first counterclaim seeking ejectment, defendants contend that they are entitled to have plaintiff ejected from the premises since they are the rightful owners of the premises and plaintiff obtained possession of the apartment without their permission. Upon the granting of summary judgment on that counterclaim, defendants request that the second and third counterclaims for use and occupancy be severed for trial.

In opposition, plaintiff claims, *inter alia*, that defendants have no right to eject him as he is one-half owner of the premises and it is he who is entitled to damages from the defendants for their withholding of possession of the first floor apartment from him.

With respect to plaintiff's first claim, even assuming that the description of Lily Wong as his wife on the deed was a scrivener's

error, it is well established that the statute of limitations in a reformation cause of action begins to run when the mistake is committed [*Tursi v St. Joseph's Sanatorium*, 133 AD2d 910, 912). As an exception to this rule, "the statute never begins to run . . . until [a party] has notice of a claim adverse to his under the instrument, or until his possession is otherwise disturbed" (*Hart v Blabey*, 287 NY 257, 263). However, that exception has usually been applied in cases where the error concerns the description of the property rather than the names of the parties because one in possession of property may not become aware of a description error until his or her possession is challenged. Plaintiff's claim that he did not scrutinize the deed at the closing is belied by the fact plaintiff had admittedly passed himself off as the defendant Chun Wong during the entire process of buying the house. He signed the mortgage application, contract and deed in the name of Chun Wong, a practice he was admittedly accustomed to doing in connection with filing of income tax returns for defendants. In addition, if Lily Wong did in fact represent plaintiff to be her husband at the closing, nowhere does plaintiff state that he repudiated this representation. Obviously, the parties could not complete the transaction without this ploy of deception. Thus, even accepting the contention that the description was a mistake, based upon plaintiff's conduct, he knew or should have known that such an error could occur.

Furthermore, since plaintiff was in possession of the deed from 1976 to the present, he had an ample opportunity to inspect it and discover this alleged error. Consequently, this claim is barred under CPLR 213(6) as having been commenced more than six years after the commission of the alleged mistake (*Tursi v St. Joseph's Sanatorium*, *supra* at 912).

Plaintiff's claim that defendants should be equitably estopped from pleading the statute of limitations as a result of the defendants' repeated assurances he was part owner and Lily Wong's misrepresentation that he was her husband is misplaced. That doctrine is equitable in nature "and is founded on good

conscience and fair dealing. It is invoked to prevent fraud and injustice . . . [However,] [o]ne who has acted in bad faith cannot avail himself of the remedy" (citation omitted) (*Angerosa v White Co.*, 248 App Div 425, 433, *affd* 275 NY 524). Thus, based upon plaintiff's own misconduct, he cannot rely on this doctrine.

The second cause of action seeking to impose a constructive trust is equally unavailing as "A constructive trust will be imposed where property is *parted with* on faith of an oral or implied promise to reconvey, 'but none may be imposed by one who has no interest in the property prior to obtaining a promise that such interest will be given to him' . . ." (citation omitted) (*Scivoletti v Marsala*, 97 AD2d 401, 402, *affd* 61 NY2d 806) (emphasis in original). Having had no prior interest in the subject premises, plaintiff is not entitled to the imposition of a constructive trust. In any event, even if plaintiff were entitled to a constructive trust, such a claim is barred by the six-year statute of limitations proscribed by CPLR 213(1) as the claim accrues when the property in dispute is held adversely to the beneficiary's rights (*Augustine v Szwed*, 77 AD2d 298, 300). As a result of his actions, plaintiff knew or should have known that at or about the time the property was acquired, i.e., 1976, the deed reflected an interest adverse to his own (*Augustine v Szwed, supra* at 301). In fact, having had exclusive possession of the deed since 1976, plaintiff was in a better position to make this determination. Consequently, the action is time barred (CPLR 213[1]). It is noted that the statute of frauds is not a defense to an action to impress a constructive trust since such a trust does not require a writing (*Vanasco v Angiolelli*, 97 AD2d 462). Thus, defendants' reliance on the statute of frauds is likewise misplaced.

Contrary to defendants' assertion, plaintiff's third cause of action is for actual fraud and not constructive fraud in that plaintiff is alleging scienter on the part of defendants (see, *Brown v Lockwood*, 76 AD2d 721, 731). In order to establish such a cause of action, a plaintiff must prove:

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> "(1) that the [defendant] made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the [defendant], (5) that the representation was made for the purpose of inducing the plaintiff to rely upon it, and (6) that the plaintiff rightfully did so rely (7) in ignorance of its falsity (8) to his injury (*Brown v Lockwood*, 76 AD2d 721)" (*113-14 Owners Corp. v Gertz*, 123 AD2d 850, 851).

However, plaintiff was not justified in relying on any representations made by defendants as he was a party to any fraud that may have been committed by defendants. A party claiming relief against the fraud of another "must himself be free from the imputation of fraud. One cannot by his own fraud acquire a right to maintain an action in any court" (60 NY Jur 2d, Fraud and Deceit, § 175). The fact that defendants may be guilty of any fraud does not alter the result as any wrong was equal on both sides, and neither side was in a position superior to the other and, in fact, plaintiff admits having been in a better economic position than the defendants at the time the premises were purchased (see, 60 NY Jur 2d, Fraud and Deceit, § 176).

Plaintiff's fourth cause of action is, as previously stated, really a claim for an equitable lien as it seeks to recover moneys expended by him in reliance upon a promise to convey (*Scivoletti v Marsala*, *supra* at 402). However, such relief is unavailable as a court of equity will not aid one who comes into court with unclean hands (*Farino v Farino*, 88 AD2d 902, 903). As previously stated, the acquisition of the premises was based partly on deception by the plaintiff. Consequently, a court of equity will not lend its aid where the basis of the suit is contrary to good morals (*Farino v Farino*, *supra* at 903). Again, the fact that the defendants are at fault too does not relieve plaintiff's behavior as "Equity dos [sic] not make adjustments between wrongdoers" (20 NY Jur, Equity, § 114).

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Finally, plaintiff's claim against Citibank for an order cancelling and setting aside defendants' mortgage interest in one-half of the premises must be dismissed as moot. Since it has been determined that plaintiff has no rights with respect to ownership of the premises, he has no standing to challenge the mortgage that defendants obtained from Citibank.

With respect to defendants' counterclaims, summary judgment must be denied. There is an issue of fact which cannot be resolved on the papers as to whether any payments of money made by plaintiff to defendants, other than those provided by the stipulation, created a monthly tenancy and thus required the service of a 30 day notice upon plaintiff in order to convert the tenancy to one for a fixed term (see, *Alleyne v Townsley*, 110 AD2d 671, 675).

Accordingly, plaintiff's cross-motion is denied in its entirety as academic. Defendants Lily and Chun Wong's motion for summary judgment dismissing the complaint is granted and defendant Citibank's cross-motion for summary judgment dismissing the complaint as asserted against it is also granted. That part of the Wong's motion seeking summary judgment on their first counterclaim, and severance of their second and third counterclaims, is denied.

Settle judgment.

/s/James H. Shaw, Jr.

J. S. C.

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FOOTNOTE

[1] Plaintiff had previously made application to this court for a preliminary injunction enjoining the Wongs from evicting him and collecting use and occupancy, which this court denied in a memorandum decision dated January 7, 1988. Subsequently, the Wongs served a notice to quit on plaintiff and then commenced a summary proceeding in the Civil Court to evict plaintiff from the first floor apartment of the premises known as 730 Avenue T, Brooklyn, New York, on the grounds he was a squatter or intruder. That action was tried before the Honorable Harry Michelson and a jury from April 12 through 15, 1988. The transcript of the testimony taken at that trial is annexed to plaintiff's moving papers. Pursuant to a stipulation dated April 18, 1988, the summary proceeding was discontinued. The stipulation also provided the parties with an opportunity to amend their pleadings and obligated plaintiff's attorney to turn over certain documents. In addition, the stipulation prescribed certain rights and conditions with respect to the use of the premises by the parties as well as governing the manner in which the parties would conduct themselves toward each other and provided that plaintiff should pay use and occupancy each month commencing May 1, 1988 to Wong's attorney pending the outcome of this matter.

Lastly, the stipulation provided that the Supreme Court would have exclusive jurisdiction over the parties and that the stipulation could only be enforced in the Supreme Court.

Defendants Lily and Chun Wong claim that they entered into the stipulation since the Civil Court could not afford complete relief with respect to their equitable claims. On the other hand, plaintiff claims the action was discontinued when it was made known to defendants that a recorded telephone conversation between Lily Wong and plaintiff existed in which Lily Wong conceded that plaintiff owned a one-half interest in the subject premises. Plaintiff has annexed a copy of a transcript

of that conversation to his motion. With respect to that recording, the court notes that in light of the court's final disposition, it is unnecessary to consider that document since at best it is hearsay. In any event, the court notes the transcript does not reflect any statement or statements made by Lily Wong that plaintiff has a one-half interest in the property.

Memorandum Decision, Supreme Court, Kings County, Monteleone, J., Index No. 24559/87, Dated November 2, 1989

SUPREME COURT: KINGS COUNTY (I.A.S. PART 27)

TA-CHUN WANG a/k/a CHUN WONG
a/k/a CHUN T. WANG,

Plaintiff,

vs.

CHUN WONG and LILY WONG

Defendants.

By
MONTELEONE, J.

Dated
November 2, 1989

Index No. 24559/87

In 1964, plaintiff, a journalist from Taiwan, was sent to the United States by his employer, China Daily News. His written articles brought him disfavor with the Chinese Nationalist Government and his application for political asylum was denied by our Federal Government. Mr. Ta-Chun Wang was an illegal alien when he first met the defendant, Lily Wong, while working as a waiter in a restaurant owned by this defendant's sister. Plaintiff had been evicted and needed a place to live.

The defendants lived at 185 Hester Street, New York with their three children. This was a small apartment consisting of a bedroom, living room and kitchen. The defendants had lived in this apartment in Chinatown for about ten years. Upon learning of plaintiff's plight, the defendant Lily Wong invited Mr. Wang to live in her apartment.

Several months thereafter, the defendant Lily Wong decided to purchase a home and requested the assistance of the plaintiff who was fluent in English and more knowledgeable in

business affairs. Neither defendant spoke fluent English. The defendant husband was employed as a waiter and did not participate in this search for a home nor in the negotiations leading to the taking of title in the premises in question.

The Court gives credence to plaintiff's version leading to the purchase of 730 Avenue T, Brooklyn, New York, as well as the events thereafter. Plaintiff learned of this two family home from a newspaper advertisement. Prior thereto, he and Lily Wong had seen about fifty homes located in the Bronx, Brooklyn and Queens. After reading the advertisement, Mr. Wang telephoned the owner and requested the selling price, which was $65,000.00 Shortly thereafter, plaintiff and defendant, Lily Wong went to the premises to inspect it. A discussion of finances between plaintiff and Lily Wong was held and the latter defendant told plaintiff she had about $8,000.00 which was inadequate. Mr. Wang told Lily Wong that he would put up the balance required and they agreed to become partners in the purchase of this property. Negotiations continued with the owner and they arrived at an agreed selling price of $59,000.00. This was a cash deal and it was necessary to procure a first mortgate. Plaintiff had about $35,000.00 in a savings account with the Bowery Savings Bank and a mortgage application was made to this lending institution by plaintiff and Lily Wong. Credit information was given by plaintiff on the basis of his salary and assets. All documents were signed by plaintiff and Lily Wong, as husband and wife. Since plaintiff was an illegal alien, he had previously requested and received permission to use the name of Lily Wong's husband, Chun Wong, as well as his social security number. Federal, State and City income tax returns were prepared by plaintiff and were signed by him as Chun Wong and by Lily Wong as his wife. Salary W-2 forms were annexed and they included plaintiff's record of earnings as well as those of both defendants, making an aggregate total of salary earnings of three persons.

The title closing to this real property was attended by plaintiff and defendant, Lily Wong. The defendant, Chun Wong did

not attend nor did he thereafter participate in the financial matters relating to payment of mortgage, taxes, rents, etc. Plaintiff paid $8,600.00 towards the contract down payment which he withdrew from the Bowery Savings Bank. He also shared in the closing costs and personally paid $300.00 for attorney's fees. Title was taken in the name of Chun Wong and Lily Wong, his wife, by deed dated January 8, 1976.

Tapes of conversations between the parties are in evidence together with a translation from Chinese [Cantonese] into English. The following excerpts constitute admissions against interest by the defendant, Lily Wong:

Pgs. 4-5.	P. Wang:	"I mean that if you don't want to sell it [the house], also don't want to buy the half I own, then let's stay the way we were. Do you agree?"
	D. Lily Wong:	"I don't know. I have to ask Wong." (Chun Wong - her husband)
	P. Wang:	"Why don't you like to stay the way we were? Just like the past, nothing changed! Isn't that right? Just like in the past, I pay a half and we share the rent evenly. Why can not you answer this? It is just like the past. Right?"
	D. Lily Wong:	"Let me think about it. Let's wait until Chor [her husband] comes back and look at the houses together."
Pg. 23.	P. Wang:	"So expensive? Did you read the bills? Is there any problem?"

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D. Lily Wong: "Oh, I paid so much money for this year, and it seems that I still have to give you back some."

Pgs. 55-56 P. Wang: "But when you want to sell the house, you need these documents. These documents are in there. Of course. I will give them to you."

D. Lily Wong: "The documents are needed when it is time to sell. Since it is not expensive to go to Taiwan, I can go every year often. When I want to sell it, I can go again and get them from you."

P. Wang: "O.K."

D. Lily Wong: "You will feel no qualm if you bring them with you. You don't have to worry that I will take over your half."

Pgs. 61-62 P. Wang: "You are not interested in buying the half I own. I will find other people to buy it. But not all people want to buy a house and share that house with another person, right? I think my apartment costs one hundred and eighty thousand dollars. Can you estimate how much half of the house is?"

D. Lily Wong: "You have no right to sell half of the house. I have no right to sell half of the house, either, and I do not want to sell the half I own, too!"

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Following closing of title, the parties moved into the second floor apartment, consisting of six (6) rooms. Plaintiff occupied one of these rooms and the defendants and their children occupied the balance. The first floor apartment and garage were rented for income to defray expenses. Defendant, husband, Chun Wong, retained the apartment located at 185 Hester Street since it was easier for him to commute to his job as a waiter in New Jersey. The present rent paid by defendants for this apartment is $68.68 per month. The testimony revealed that the defendant husband spent six nights at Hester Street and one night in his new home.

The exhibits include accounting statements for the years 1976 up to and including 1986 prepared by the plaintiff. They disclose monies expended by plaintiff and defendant, Lily Wong as well as income from rents. As indicia of ownership, Mr. Wang made numerous repairs and improvements to the premises. His actions were those of any owner and not as a tenant or licensee.

Plaintiff moved into the first floor apartment on June 11, 1987. Thereafter, defendants brought a summary proceeding in the Civil Court seeking to evict Mr. Wang. A stipulation of settlement was entered into whereby it was agreed that the plaintiff, "commencing on May 1, and on the first of each month thereafter until the Supreme Court matter is resolved," was to pay $750.00 per month to defendants' attorney and the latter was to deposit one-half in an interest bearing escrow account and the other half was to be paid to the defendants for the payment of taxes and mortgage payments.

Plaintiff's action in the Supreme Court sought the following relief: (1) Reformation of the deed; (2) imposition of a constructive trust; (3) fraud and misrepresentation; (4) unjust enrichment and (5) cancellation of a mortgage. Defendants' motion for summary judgment dismissing plaintiff's complaint was granted by Justice James H. Shaw, Jr. pursuant to an order

entered on December 2, 1988, based upon his decision dated November 10, 1988. This order severed defendants' counterclaims and ordered a trial of the issues relating to, "whether any payments of money made by plaintiff to defendants, other than those provided by the stipulation created a monthly tenancy and thus required the service of a thirty day notice upon plaintiff in order to convert the tenancy to one for a fixed term."

Defendants' counterclaims requested the following relief: (1) ejectment (2) fixation of use and occupancy of the first floor apartment since June 11, 1987 and (3) use and occupancy prior to June 11, 1987.

During trial, defendants moved to discontinue the third counterclaim conditionally pending resolution of the appeal from the order of December 2, 1988 dismissing plaintiff's complaint. Defendants contended that the sole issues before this Court were ejectment and fixation of use and occupancy. However, it was the contention of plaintiff that he had the right to interpose equitable defenses to ejectment relying upon *Miceli v Riley*, 79 AD2d 165; *Grunder v Recckio*, 138 AD2d 923; and *Call v LaBrie*, 116 AD2d 1034. *Also see, Janke v Janke*, 47 AD2d 445 affd 39 NY2d 786; *Washington v Defense*, ____AD2d____, 540 NYS2d 491 (2d Dept. 1989); and *Green-Wynia v Capobianco*, NYLJ, 5/8/89, p28, col 3.

Although plaintiff's reply to defendants' answer consisted of a general denial without interposing any affirmative defenses, it must be borne in mind that at the time this reply was made, plaintiff's complaint was a viable one since its dismissal occurred thereafter. Plaintiff's motion to conform his pleadings to the proof was granted in the interest of justice. There was no prejudice to the defendants because they were aware of plaintiff's allegations.

Defendants contend that there is no real issue relating to plaintiff's ejectment since their motion for summary judgment

dismissing plaintiff's complaint was granted and although there is an appeal from this order of December 2, 1988 presently pending, the present status is that Mr. Wang has no possessory interest in premises 730 Avenue T and accordingly, he should be ejected and ordered to pay for use and occupancy. The plaintiff, on the other hand, contends that he is a partner with the defendant, Lily Wong and that they are equal fee owners of the premises and that as an owner he cannot be ejected and ordered to pay for use and occupancy.

It is apparent that if the plaintiff is ejected prior to the resolution of the pending appeal in the Appellate Division, he will suffer irreparable harm. If successful in his appeal and Mr. Wang's complaint reinstated for trial, the issue of ownership will require plenary trial. In order to avoid a trial *de novo*, the Court suggested that this trial be adjourned until the resolution of the appeal. However, defendants objected and insisted that this trial go forward since previous applications for a stay had been denied.

In addition to relying upon the dismissal of plaintiff's complaint, defendants not only denied any partnership purchase, but also, that it was the understanding of the parties that plaintiff would live with them for ten years and then return to Taiwan. The defendant, Lily Wong testified that she did plaintiff's laundry, and that Mr. Wang ate meals prepared by her. In essence, defendants contend that the monies expended by the plaintiff were in payment for free room and board for ten years, ending in 1986. The Court finds this testimony incredible, and accepts the plaintiff's version which is substantially supported by the evidence.

The Court finds that it was the intention of the plaintiff and the defendant, Lily Wong, to buy this property as partners and that they presently own one-half each. This finding, under the present status of their litigation, poses a dilemma which is self

evident. Can a Court, sitting in equity, eject plaintiff before resolution of the appeal presently alluded to?

It is the opinion of this Court that equity warrants that the determination of the legal right to eject plaintiff must await the resolution of his appeal. No substantial prejudice is caused since plaintiff is paying $750.00 per month pursuant to their stipulation.

This Court's findings are made upon the proof presented and which, in all likelihood, would be dispositive in the event plaintiff is successful on appeal and his complaint is reinstated for trial.

However, in the interim, this Court will also decide the remaining issues. With respect to the reasonable market rental value of the first floor apartment, presently occupied by the plaintiff, the evidence discloses that the first rental of this apartment was in 1976 in the sum of $275.00 per month. The next rental occurred in 1978 at $280.00 per month. The last tenant moved out in September, 1986 and the rental was $450.00 per month. This apartment remained vacant from September, 1986 until the plaintiff moved in on June 11, 1987. Mr. Wang testified that the defendant, Lily Wong was asking $800.00 per month and that no one came to see it. Defendants' expert, Peter Wong, testified that he had seen the second floor apartment about eighteen months ago and that in his opinion the market rental value was $750.00 per month in 1987; $800.00 in 1988 and $850.00 for 1989. Mr. Wong conceded that he had never seen the first floor apartment, but rendered opinions based on hypothetical questions to the effect that the fair market value is the same for both apartments.

The Court is aware that real estate values have increased significantly in the last decade and that rental values of apartments, not controlled by existing laws, have also increased substantially. It is apparent that the parties to this litigation have

acknowledged this phenomenon in agreeing that the sum to be paid by the plaintiff for use and occupation is $750.00 until their litigation is resolved. Accordingly, on the basis of all the evidence the Court finds that the fair market value for the first floor apartment is $750.00 per month and is the amount to be paid by the plaintiff for use and occupancy.

The Court also finds that the plaintiff is entitled to a set-off, with respect to his payment of use and occupancy for improvements made pursuant to RPAPL §601. In this regard, Mr. Wang testified that he installed insulation in the attic and expended $390.00 for material. He also performed electrical work and purchased materials for a cost of $264.00. He also replaced the shingles on the roof of the garage. There was considerable testimony relating to repairs made by plaintiff. However, since they do not constitute improvements pursuant to RPAPL §601, no allowance is made for such repairs. Mr. Joseph Conversano, plaintiff's expert, testified that the reasonable value for labor with respect to the electrical improvements made is $1,400.00; for insulation as installed in the attic $2,200.00; for plumbing $400.00; tiling bathroom $185.00; removing, reinforcing and relaying parquet flooring $2,500; cement and brick work $650.00; waterproofing and caulking windows $2,450.00; and shingling the garage roof $385.00. The total sum allowed as a set-off is $10,824.00 for labor and materials.

Settle judgment.

Decision and Order on Motion, Appellate Division, Second Department, Dated October 12, 1990, Denying Reargument and Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

0412T
B/nl

LAWRENCE J. BRACKEN, J.P.
THOMAS R. SULLIVAN
STANLEY HARWOOD
ALBERT M. ROSENBLATT, JJ.

90-03906

Ta Chun Wang a/k/a Chun Wong a/k/a Chun T. Wang, appellant, v Chun Wong, et al., respondents.

DECISION & ORDER ON MOTION

Motion by the appellant (1) for reargument of the appeal from an order and judgment of the Supreme Court, Kings County, entered December 2, 1988, or in the alternative, (2) for leave to appeal to the Court of Appeals from the order of this court dated July 2, 1990, which affirmed the order and judgment.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

BRACKEN, J.P., SULLIVAN, HARWOOD and ROSENBLATT, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

October 12, 1990

WANG v WONG

Order, Court of Appeals, Dated February 19, 1991, Denying Leave to Appeal

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February A.D. 1991

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-10 Mo. No. 1312
Ta Chun Wang a/k/a Chun Wong
a/k/a Chun T. Wang,

Appellant,

v.

Chun Wong, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

Sec. 245A, Immigration & Nationality Act, 8 U.S.C. § 1255a

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application

(A) During application period

Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General.

* * *

(2) Continuous unlawful residence since 1982

(A) In General

The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

* * *

Sec. 245A, Immigration & Nationality Act,
8 U.S.C. § 1255a

(3) **Continuous physical presence since November 6, 1986**

(A) In general

The alien must establish that the alien has been continuously physically present in the United States since November 6, 1986.

(B) Treatment of brief, casual, and innocent absences

An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

* * *

(4) **Admissible as immigrant**

The alien must establish that he –

(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section,

(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion, and

(D) is registered or registering under the Military Selective Service Act [50 U.S.C.A. App. § 451 et seq.], if the alien is required to be so registered under that Act.

* * *

(b) **Subsequent adjustment to permanent residence and nature of temporary resident status**

(1) **Adjustment to permanent residence**

The Attorney General shall adjust the status of any alien provided lawful temporary resident status under subsection (a) of this section to that of an alien lawfully admitted for permanent residence if the alien meets the following requirements:

Sec. 245A, Immigration & Nationality Act,
8 U.S.C. § 1255a

(A) Timely application after one year's residence

The alien must apply for such adjustment during the 2-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status.

(B) Continuous residence

(i) In general

The alien must establish that he has continuously resided in the United States since the date the alien was granted such temporary resident status.

(ii) Treatment of certain absences

An alien shall not be considered to have lost the continuous residence referred to in clause (i) by reason of an absence from the United States permitted under paragraph (3)(A).

(C) Admissible as immigrant

The alien must establish that he—

(i) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section, and

(ii) has not been convicted of any felony or three or more misdemeanors committed in the United States.

(D) Basic citizenship skills

(i) In general

The alien must demonstrate that he either—

Sec. 245A, Immigration & Nationality Act,
8 U.S.C. § 1255a

(I) meets the requirements of section 1423 of this title (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States), or

(II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

* * *

(3) **Authorized travel and employment during temporary residence**

During the period an alien is in lawful temporary resident status granted under subsection (a) of this section —

* * *

(B) Authorization of employment

The Attorney General shall grant the alien authorization to engage in employment in the United States and provide to that alien an "employment authorized" endorsement or other appropriate work permit.

* * *

(i) Dissemination of information on legalization program

Beginning not later than the date designated by the Attorney General under subsection (a)(1)(A) of this section, the Attorney General, in cooperation with qualified designated entities, shall broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits.